Date: January 2, 1997

Case No.: 95-INA-00182

In the Matter of:

SIDHU ASSOCIATES, INC.,
Employer

On Behalf Of:

JAGDISH SINGH GILL,
Alien

Appearance: Harvey Shapiro, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 1, 1993, Sidhu Associates, Inc. ("Employer"), filed an application for labor certification to enable Jagdish Singh Gill ("Alien") to fill the position of Mechanical Engineer (AF 4-5). The job duties for the position are:

> Design and cost estimation of fire protection, fire detection and security systems before and after construction of industrial and public buildings. Generate engineering drawings using AUTOCAD and HALON software, and recommend materials, equipment or methods for fire prevention systems - Troubleshoot design and field problems.

The requirements for the position are a Master's Degree in Mechanical Engineering plus two years of experience in the job offered.

The CO issued a Notice of Findings on July 26, 1994 (AF 36-38), proposing to deny certification citing 20 C.F.R. § 656.21(b)(2), which requires an employer to document that his requirements for the position are those normally required for the performance of the job in the United States and as defined for the job in the *Dictionary of Occupational Titles* ("DOT"). The CO stated that the Employer's requirement for a Master's Degree in Mechanical Engineering appears excessive and restrictive. The CO instructed that the Employer may rebut this finding by reducing the requirements or by documenting that they arise from business necessity. If the Employer chose to document business necessity, the CO advised that such documentation must show that it is normal in the industry and with the Employer to require a Master's Degree for this position. If the Employer chose to reduce the requirement, the CO advised that the Employer must express willingness to readvertise.

Further, the CO noted that pursuant to § 656.21(j), the Employer must provide the local office a written report of the results of all post-application recruitment efforts during the 30-day recruitment period, which report should identify each recruitment source by name, state the number of U.S. workers responding to the Employer's recruitment, state the names and addresses and provide resumes (if any) of the U.S. workers interviewed and job title of the person interviewing each worker. Also, the Employer, in the recruitment report, must explain the lawful,

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

job-related reasons for not hiring each U.S. worker interviewed. Additionally, the CO found that, based on the normal requirements of the position, one U.S. applicant, William Koenig, appears qualified for the position and was rejected for reasons that are not lawful pursuant to § 656.21(b)(6). Accordingly, the CO questioned good-faith recruiting and requested documentation showing that U.S. applicant Koenig was not qualified, willing, or available at the time of the initial consideration and referral pursuant to § 656.24(b)(2)(ii). Lastly, the CO noted that the job opportunity must be open to all qualified U.S. workers as stated in § 656.20(c)(8).

Accordingly, the Employer was notified that it had until August 30, 1994, to rebut the findings or to cure the defects noted.

In its rebuttal, submitted under cover letter dated August 30, 1994 (AF 39-45), the Employer contended that:

> First, we point out that our total requirements fall within the specific vocational preparation permitted to this job, between 4 and 10 years. Taking all of the requirements, we see a baccalaureate degree as counting for two years, a master's degree counting for a maximum of two years, with another two years of actual experience. This is six years in total. Our attorneys have suggested that the Board of Alien Labor Certification Appeals (BALCA) has held that where an employer's requirements fall within the normal SVP for the position, they are not to be deemed excessive.

Second, the Employer further contended that a Master's Degree is required in order to perform the job duties "at the level of our normal projects." He described the business as that of a large specialized engineering firm, dealing almost exclusively with large, government engineering projects, including the upgrading of a number of mechanical systems at the Baltimore International Airport. Finally, the Employer advised that he had asked a professor of Mechanical Engineering to comment upon their requirements, which would be submitted when received. Thus, the Employer argued that it had established that a Master's Degree in Mechanical Engineering is essential to reasonable performance of the duties of the job (AF 43).

The CO issued the Final Determination on September 7, 1994 (AF 46-49), denying certification because the Employer failed to rebut § 656.21(b)(2), that an employer is required to document that his requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the U.S. and as defined for the job in the Dictionary of Occupational Titles ("DOT"). The CO again found the requirement for a Master's Degree to be excessive and restrictive; found that the Employer had failed to document that the Master's Degree was normal for the position in the industry and with the Employer; and had failed to document the number of prior and present persons in this position, the number who had a Master's Degree, and the number who were required to have this Degree as a condition of hire. Additionally, the CO found that the Employer had failed to respond to the issue of the rejection of U.S. applicant Koenig who has a B.S. in Mechanical Engineering, knowledge of Autocad and three years of experience as a design engineer in fire protection systems.

On September 20, 1994, Counsel for the Employer requested reconsideration of the Final Determination (AF 50-63). Counsel enclosed a copy of an opinion from Dr. Leslie S. Jacobson (which the Employer had advised in the rebuttal would be submitted when received) confirming that the worker in the offered position with the job duties described in the application should have, minimally, a Master of Science Degree. The record does not reflect that any action was taken by the CO until the Employer submitted, on October 11, 1994, a request for review of the denial of labor certification (AF 64-71).

The request for reconsideration was denied by the CO on October 27, 1994 (AF 72). On November 30, 1994, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or Board").

Discussion

At the outset we note that the Employer submitted the opinion of a Mechanical Engineering Professor along with his Motion for Reconsideration (AF 42-43). However, the CO denied this motion and refused to consider this evidence because it should have been presented as part of the Employer's rebuttal to the NOF (AF 72). Generally, when the CO does not consider evidence submitted with a motion to reconsider, the Board, likewise, should decline to consider the evidence. See *Schroeder Brothers Co.,* 91-INA-324 (Aug. 26, 1992). On the other hand, if the CO considers evidence submitted with a motion for reconsideration, the Board may also consider that evidence on administrative-judicial review. *Construction and Investment Corp.*, 88-INA-55 (Apr. 24, 1989) (*en banc).* We further note that the Employer in this case did not ask the CO for an extension of time to file a complete rebuttal. The Employer's statement on rebuttal, that it would "forward the opinion very shortly" (AF 45), is not equivalent to a request for an extension of time to file a complete rebuttal. See *Dr. & Mrs. Craig Fabrikant*, 91-INA-305 (Dec. 20, 1993). Accordingly, because the CO did not consider this evidence and the Employer failed to ask for an extension of time to submit a complete rebuttal, we decline to consider it as well.

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.,* 87-INA-569 (Jan. 13, 1989) (*en banc).*

In the instant case, the CO found that the Employer's requirement of a Master's Degree in Mechanical Engineering is unduly restrictive. The DOT description for the position of Mechanical Engineer (007.061-014) lists a Specific Vocational Preparation ("SVP")[2] of 8, which is defined as "Over 4 years up to and including 10 years." There is no question that the Employer's requirement of a Master's Degree and two years of experience falls within the range

[2] Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. This training may be acquired in a school, work, military, institutional, or vocational environment.

of "Over 4 years up to and including 10 years." Thus, it is clear that the Employer's requirements cannot be found to be unduly restrictive **on the basis that they exceed the SVP** level of 8 as provided in the DOT. In accord, see *Polytechnic University*, 88-INA-282 (October 26, 1989); *Ankitson Development Corporation,* 88-INA-452 (January 3, 1990); *Ibes, Inc.,* 89-INA-187 (July 23, 1990); *Potomac Foods, Inc.*, 93-INA-309 (July 26, 1994); *Simon Martin-vegue Winkelstein Moris*, 95-INA-52 (September 25, 1996). Here, a Bachelor's Degree (four years) plus a Master's Degree (two to three years) plus two years of experience is eight to nine years of experience and is within the SVP of 8.

However, the matter is not resolved solely on the issue of whether the Employer's educational and experience requirements exceed the SVP of 8. The regulation provides at § 656.21(b)(2) as follows:

> (2) The employer shall document that the job opportunity has been and is being described without unduly restrictive job requirements:
>
> (i) The job opportunity's requirements, unless adequately documented as arising from business necessity:
>
> (A) Shall be those normally required for the job in the United States;
>
> (B) Shall be those defined for the job in *the Dictionary of Occupational Titles (D.O.T.)* including those for subclasses of jobs;
>
> (C) Shall not include requirements for a language, other than English.

20 C.F.R. § 656.21(b)(2).

A careful reading of the regulation reveals that a job offer which does not meet all three parts of § 656.21(b)(2)(i) (*i.e.*, subsections (A), (B), and (C)), is unduly restrictive, and therefore, business necessity must be established. The CO's NOF found that the requirement of a Master's Degree for the job opportunity of Mechanical Engineer is unduly restrictive in this case. Since the requirements do not exceed the SVP of 8 and there is no foreign language requirement, the CO's finding can only mean that the CO has found that the degree **is not normally required for the job in the United States**, in violation of § 656.21(b)(2)(i)(A). Therefore, we find that the CO correctly required the Employer to establish the business necessity for the Master's Degree.

However, the NOF advised that the Employer could rebut this finding by two means; the Employer could reduce the requirement and readvertise, or he could document the business necessity for the requirement. The CO should have, but did not, offer the Employer the opportunity to rebut by showing that the Master's Degree **is normally required for the job in the United States**, pursuant to § 656.21(b)(2)(i)(A). Significantly, if the Master's Degree was **normally required for the job in the United States**, the Employer would not need to establish business necessity.

The CO advised that if the Employer chose to document business necessity of the Master's Degree, he must show that it is normal in the industry **and with the Employer** to

require a Master's Degree for this position. This instruction unfortunately confuses the issues of **whether the Employer is in compliance with § 656.21(b)(2)(i)(A)** (*i.e.*, the requirement is normal for the job in the United States) with the issue of **how the Employer may establish business necessity** for the requirement in question.

The confusion is also evident when the Employer's argument, presented in the request for review, is considered. Counsel argues as follows:

> This review is requested upon the grounds that the Certifying Officer erred as a matter of law with respect to the application of 20 C.F.R. § 656.21(b)(2)(i). The Certifying Office instructed and directed Employer to establish that the education requirement arose from business necessity by submitting documentation showing ... 'that it is normal in the industry and with the employer to require a master's degree ...' The applicable regulations and case law do **not** require Employer to document 'normalcy' to establish business necessity. Further, the test for 'normalcy' may be established by documenting that the requirement at issue is normal for either the Employer or the industry, not both ... (AF 71).

We have defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc*). The *Information Industries* standard requires that the employer show the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and that the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer.

The CO's standard improperly requires the Employer to show that the degree requirement is both normal in the industry and with the employer, in order to establish business necessity. It is improper in that, if the requirement were normal for the industry (**normally required for the job in the United States**) it would not violate § 656.21(b)(2)(i)(A), and the Employer, here, would not **need** to establish business necessity.

Finally, we note that the CO also denied certification on the grounds that a U.S. applicant was unlawfully rejected. Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of good-faith recruitment effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

The Employer in this case did not contact U.S. applicant Koenig, who has a B.S. in Mechanical Engineering, knowledge of Autocad, and three years of experience as a design engineer in fire protection systems, because he does not have a Master's Degree in Mechanical Engineering (AF 25). As such, the CO requested that the Employer provide documentation showing that the applicant was not qualified, willing, or available at the time of initial

consideration and referral (AF 36). Specifically, the Employer was instructed to document the job-related reasons for rejection, if the applicant was interviewed, and, if the applicant was rejected based on his resume, the Employer was asked to specify why he was rejected solely upon consideration of the resume without the benefit of an interview.

In his rebuttal, however, the Employer failed to address this issue. Generally, an employer's failure to produce documentation reasonably requested by the CO will result in a denial of labor certification. *John Hancock Financial Services*, 91-INA-131 (June 4, 1992). Furthermore, § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. On this basis, the Board has repeatedly held that the CO's finding which is not addressed in the rebuttal is deemed admitted. *Belha Corp.*, 88-INA-24 (May 5, 1989) (*en banc)*; *Salvation Army*, 90-INA-434 (Dec. 17, 1991); *Michael's Foods, Inc.*, 90-INA-411 (Nov. 14, 1991).

However, the issue of rejection of Mr. Koenig is only relevant if the Employer does not prevail on the issues of whether the degree is normal in the United States (§ 656.21(b)(2)(i)(A)) or if the Employer is not able to establish business necessity. Thus, we find that the Employer's failure to address this issue is an admission that, if the Master's Degree is ultimately found to be unlawfully restrictive, and if the Employer cannot establish business necessity for the Degree, then Mr. Koenig was unlawfully rejected for the position at issue in this case.

Therefore, we find that this matter must be remanded to the CO for issuance of a new Notice of Findings, which gives the Employer an opportunity to **first**, rebut the CO's determination that the Master's Degree is not normally required for the job in the United States**,** in violation of § 656.21(b)(2)(i)(A). **Second**, if the Employer chooses not to (or cannot) rebut by showing that the Master's Degree is normally required for the job in the United States, the Employer may establish business necessity under the standard of *Information Industries, supra*.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and this matter is **REMANDED** for appropriate action consistent with this decision.

Entered this the _____ day of January, 1997, for the Panel.

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary

to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.